



# Draft Guidelines and Recommended Practices for Improving the Administration of Justice in Domestic Violence Cases

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JUDICIAL COUNCIL DOMESTIC VIOLENCE  
PRACTICE AND PROCEDURE TASK FORCE



ADMINISTRATIVE OFFICE  
OF THE COURTS

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CENTER FOR FAMILIES, CHILDREN  
& THE COURTS

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## Introduction to Guidelines and Recommended Practices

### Background

On September 6, 2005, Chief Justice Ronald M. George appointed the Domestic Violence Practice and Procedure Task Force to recommend changes to improve court practice and procedure in cases involving domestic violence allegations. As Chief Justice George stated when he initially appointed the task force members: “Our goals are to ensure fair, expeditious, and accessible justice for litigants in these critical cases and to promote both victim safety and perpetrator accountability.”

The task force charge included as well the review and implementation, as appropriate, of court-related recommendations contained in the June 2005 report to the California Attorney General from the Task Force on Local Criminal Justice Response to Domestic Violence, entitled *Keeping the Promise: Victim Safety and Batterer Accountability*.

### Areas of inquiry

A significant component of the task force’s work has involved the development of a series of guidelines and recommended practices and procedures. These guidelines and procedures were derived from statutory and other mandates as well as suggestions for improvements in the administration of justice relating to cases involving domestic violence allegations. In general, the guidelines and practices fall into the following categories of inquiry:

- Court leadership
- Restraining orders
- Firearms relinquishment
- Entry of restraining and protective orders in the Domestic Violence Restraining Order System (DVROS) and access to that system
- Criminal law procedures

### Methodology

The task force met five times and conducted a series of conference calls since its inception to develop and discuss the proposed guidelines and practices. In crafting its recommendations, the task force relied on the expertise and experience of its members, an extensive literature search, recommendations submitted by presiding judges and court executive officers, suggestions from attendees at judicial education programs in subject areas relating to domestic violence, and survey results from court staff and family law judicial officers. In addition, the task force conducted two invitational forums designed to develop proposals in the difficult areas of firearms restrictions and relinquishment and improving access to and entry of orders into DVROS.

Based on these two invitational forums and the additional information-gathering mechanisms described above, the task force developed its proposals. The text of the proposed guidelines and practices is attached on pages 8–41.

### **Guiding principles**

Development of the task force proposals was guided by reference to key underlying principles as well as goals previously established by the Judicial Council. The task force determined that the proposals should be framed to further the following objectives:

- Promote the safety of all court participants;
- Ensure accountability of domestic violence perpetrators;
- Improve accessibility to the courts for the parties by maximizing convenience; minimizing barriers, and ensuring fairness for a diverse population;
- Promote the use of technology to enhance the administration of justice in cases involving domestic violence allegations; and
- Emphasize the need for court leadership and adequate resources.

These overarching principles are consistent with and derived from the Judicial Council’s strategic plan and three of its primary goals: (1) Access, fairness, and diversity; (2) Quality of justice and service to the public; and (3) Technology. Moreover, these principles fit squarely within several of the thematic areas targeted by the council as part of its continuing efforts to improve public trust and confidence in the California courts: barriers to taking a case to court, diversity and the needs of a diverse population, and fairness in procedures and outcomes.

The task force, in developing its draft guidelines and recommended practices, acknowledges that improving the administration of justice in cases involving allegations of domestic violence must be a systemic endeavor. Moreover, many of these proposals are detailed and technical in nature because systemic problems often require a detailed analysis and approach. The task force also wishes to emphasize that implementation of some of its proposals will require additional resources. The members believe, however, that scarce resources should not serve as a limiting factor at this juncture and invite comment on the nature and extent of the resources that may be needed to implement these proposals. With court leadership, the members of the task force hope that a varied array of justice system partners will be willing to analyze these issues and assist in improving court practice and procedure in this critical area.

### **Review of proposed guidelines and practices**

The next year of task force activities will involve obtaining diverse and thoughtful comments on these proposals from the judicial branch, justice system partners, and the public through the following mechanisms:

- Distribution of proposed practices and procedures for public comment;
- Public hearings;

- Regional domestic violence meetings for judicial officers and court staff;
- Focus groups for specific stakeholders;
- Discussions with Judicial Council advisory committees.

The task force will review and revise its proposals based on the suggestions received and report to the Judicial Council in December 2007. Those proposals approved by the Judicial Council will be published widely, used in judicial branch education, and, where appropriate, referred to relevant Judicial Council advisory committees for implementation.

### **Request for comment**

The Administrative Office of the Courts encourages comment on the proposals that follow. Of specific interest to the task force are the following questions:

#### **For each major focus area:**

**(Benefits)** What benefits will be gained by implementation of the proposals?

**(Unintended consequences)** Do the proposed guidelines and practices create any unintended consequences for the courts, justice system partners, the parties, or the public?

**(Priority)** Which of the enumerated guidelines and practices are of particular importance?

**(Omissions)** Are there any additional proposals, not yet identified by the task force, that are advisable and if so, what is the justification for the inclusion of a new proposal?

**(Resources)** What are the resource needs required for implementing the proposals?

Please submit comments in writing via mail, e-mail, or fax to:

Domestic Violence Practice and Procedure Task Force  
Center for Families, Children & the Courts  
Administrative Office of the Courts  
455 Golden Gate Avenue  
San Francisco, CA 94102-3688  
Fax: 415-865-7217  
DVPPTF@jud.ca.gov

This report is also available on the California Courts Web site: [www.courtinfo.ca.gov/jc/advisorycommittees.htm#dvpp](http://www.courtinfo.ca.gov/jc/advisorycommittees.htm#dvpp).

The text of the proposed guidelines and practices, a list of major sources consulted, and a roster of task force members and staff follow.

**Staff Note:**

For purposes of these practices, use of the word “court” indicates the appropriate arm of the court, such as the judge, clerk, or administrator, as determined by each local court.

Practices that may result in increased significant expenditures or require additional funding are followed by two dollar signs: \$\$.

Whether the following practices should be memorialized as rules, standards of judicial administration, or recommendations contained in publications, manuals, or judicial education has not yet been determined.

## Draft Guidelines and Recommended Practices

### Court Leadership

1. ***Court leadership.*** In order to improve both public safety and public trust and confidence in the justice system, the presiding judge and court leaders should allocate adequate resources, including those for staffing and education, necessary to ensure the fair and accessible adjudication of cases involving domestic violence allegations. The courts should engage in an ongoing process to develop, monitor, and evaluate procedures and protocols designed to improve the administration of justice in these critical cases.
2. ***Working with justice system entities and community organizations.*** As ethically appropriate, the court should participate in domestic violence coordinating councils or court-convened committees that provide an opportunity for justice system partners to comment on court practice and procedure relating to domestic violence cases and a mechanism for improving these practices and procedures. Ethically appropriate councils or committees at a minimum (a) are inclusive in that representatives from all interests and sides of the litigation are invited to participate, (b) do not involve discussion of pending cases, (c) do not involve judicial officers in fundraising, and (d) do not involve judicial officers in urging the adoption of legislative measures unrelated to court practice and procedure.
3. ***Use of temporary judges.*** To the extent feasible, the use of temporary judges to adjudicate cases that typically involve domestic violence allegations is discouraged. Education for temporary judges should include instruction about domestic violence cases and should include issues relating to court accessibility regardless of immigration status.



## Draft Guidelines and Recommended Practices

### Domestic Violence Prevention Act Restraining Orders

Domestic violence restraining orders issued in family court can be a powerful tool to deter future violence, secure safe child custody and visitation arrangements, and provide temporary financial stability. Several studies have shown these orders to be effective in improving safety for persons and families experiencing domestic violence. However, there are numerous steps a litigant must take to secure and enforce an effective restraining order. Effective court practices play a crucial role in the ability of parties to take the necessary steps to obtain, understand, and comply with the orders. Without focused attention on the development and implementation of effective court practices, courts can unwittingly be a barrier instead of a facilitator to public safety.

The practices outlined below were developed from a review of national, state, and local publications; a review of existing court practices around the state; and discussions among staff and the Judicial Council of California's Task Force on Domestic Violence Practice and Procedure.

The proposals address the restraining order process from the view of litigants, the court, and law enforcement with the goals of simplifying and streamlining procedures for litigants, improving communication within the court, increasing the availability of information for the judicial officer, and enhancing enforceability of the court's orders.

Implementation of many of the proposals would require additional funding, sometimes significant amounts. However, many courts have found ways to reduce barriers without additional funds. We hope to learn about court strategies for implementing the proposals and we plan to share those strategies in upcoming meetings and publications.

Ultimately, the success of domestic violence restraining orders in reducing violence and increasing public safety relies on the efforts of California's network of public and private agencies. The proposals reflect that interdependency and encourage each agency to take steps to promote the court's ability to improve the administration of justice.

#### **Assistance for parties (general)**

1. ***Removal of barriers.*** Each court should review its practices and procedures generally and make relevant changes designed to reduce barriers to court access for litigants in restraining order proceedings.
2. ***Access to restraining orders.*** Courts should ensure that only those eligibility requirements required by statute or rule are imposed upon a litigant seeking to obtain

a restraining order. To ensure public safety, any person can request a restraining order regardless of unrelated factors such as immigration status or alleged criminal conduct.

3. ***Information/resources for the parties.*** The court should inform the parties about resources that are available in restraining order proceedings in accordance with their requests and needs and pursuant to Family Code section 6343 requiring courts to develop a resource list, in consultation with local domestic violence shelters and programs, of appropriate community domestic violence programs and services to be provided to each applicant for a domestic violence restraining order. However, the court should be cognizant of providing information to both parties. The resources could include:
  - AOC informational pamphlet and video;
  - Available victim-witness services or funding;
  - Appropriate referrals to community domestic violence programs and services, including batterer intervention programs;
  - Self-help services;
  - Other community services, including those providing immigration information.
4. ***Legal services.*** Each court should provide information to all litigants about the availability of legal services and should explore options with the bar and other agencies to foster increased representation for both parties in domestic violence restraining order cases.
5. ***Family law facilitator/self-help center.*** Additional funding should be provided for the family law facilitator and/or self-help center program, if appropriate, to enable provision of services to all parties beyond the federally funded child support program. The program should be funded to include providing information and appropriate assistance on court practice and procedure in domestic violence cases. \$\$
6. ***Computers available.*** So that litigants have access to electronic domestic violence self-help software, the courts should make every effort to make computers available for use by litigants in restraining order proceedings at self-help centers or family law facilitators' offices that provide assistance in domestic violence cases. \$\$
7. ***Counseling.*** Individuals seeking protection in domestic violence cases should not be ordered to attend counseling without careful consideration as to the court's authority to order counseling for the protected person and the value of mandatory counseling under the circumstances of the case. Under existing law, a court may not order a protected party to obtain counseling without the consent of the party unless there is a custody or visitation dispute (Fam. Code, § 3190.). In the event the court orders counseling, the court must make the requisite findings under Family Code section 3190 and should order separate counseling sessions under Family Code section 3192.

Nonmandatory referrals to counseling or related services may be made and should be provided pursuant to Family Code Section 6343's requirement that courts develop resource lists of referrals to appropriate community domestic violence programs and services.

8. ***Confidentiality.*** Courts should inform parties that most filed documents are public and should provide information on how to safeguard certain pieces of information such as addresses or confidential locations (for example, the Secretary of State's Safe at Home Program, [www.ss.ca.gov/safeathome](http://www.ss.ca.gov/safeathome)).

#### **Obtaining and perfecting orders**

9. ***Emergency protective orders.*** Each court should have a workable practice for obtaining emergency protective orders to maximize accessibility of the procedure for the parties. The court should ensure that a judicial officer is available to law enforcement during business and nonbusiness hours for review of applications for emergency protective orders. The court should also encourage and support law enforcement's use of the after-hours procedure. A local court could create a duty judge system of rotation that works in tandem with obtaining search warrants.
10. ***Reasonable and timely access to review of applications for restraining orders.*** Each court should have a mechanism for reviewing an application for a restraining order within one business day unless the application is submitted too late under Family Code section 6326. Courts should develop procedures to (1) ensure timely access at convenient court locations so that travel to the appropriate courthouse will not unduly burden the party seeking review of the application; and/or (2) develop electronic mechanisms such as fax, e-mail, or videoconferencing to facilitate prompt review of the application. §§
11. ***Notice in ex parte proceedings.*** No blanket rule requiring notice for every ex parte motion should be required. The act of notifying a proposed restrained person about an applicant's request for a restraining order can pose a significant risk of harm to the applicant, as abuse often increases at the time of separation. As provided in Family Code section 6300, the court should determine on a case-by-case basis, depending on the circumstances, whether notice of an application for a temporary restraining order is required. In its analysis, the court should take into account the level of danger to the applicant. If the applicant requests a residence-exclusion order or a change of custody, to foster safety and ensure due process, special scrutiny is required. Family Code section 6343 requires courts to develop a resource list of agencies. In all cases, applicants should be referred to community services and should be advised of the National Domestic Violence Hotline (1-800-799-SAFE).
12. ***Background checks.*** To enhance public safety, where possible, each court should conduct timely criminal background checks and checks for pending restraining and

protective orders involving either party that can be considered by the judicial officer both at the temporary restraining order stage and at the hearing on the application, as described in Family Code section 6306. However, lack of sufficient resources often makes it impossible for courts to conduct this important research. Additionally, there are significant challenges associated with navigating the Department of Justice's (DOJ) databases. The DOJ should make records easily accessible and quantify the length of time needed to check records. \$\$

13. ***Service of process.*** Each court should collaborate with law enforcement and processing services to ensure timely and effective service of process of restraining orders and related documents.
14. ***Preparation and provision of restraining order.*** The court should ensure that a completed, signed, and filed copy of the order, as well as certified copies of the order as required by Family Code section 6387, are prepared and provided to the person who requested the order on the same day after issuance of a temporary restraining order or order after hearing. The order after hearing should be provided as soon as possible to all parties who are present at the proceeding. Courts should work with the bar to encourage timely completion of orders.
15. ***Past acts.*** In reviewing applications for temporary restraining orders, the court should not impose a blanket or arbitrary timeline of what constitutes a "past act of abuse." Rather, the court should make its determinations on a case-by-case basis.
16. ***Child and spousal support orders available.*** In a Domestic Violence Prevention Act (DVPA) proceeding when child or spousal support is requested, and appropriate financial documentation is submitted, the court shall consider the request and order support as appropriate at the same time as the restraining order request is considered or as soon thereafter as possible to ensure safety. (See Fam. Code, § 6341 (a) and (c).) \$\$
17. ***Additional protected persons.*** When the court issues a restraining order, the court should consider whether the conditions of the order should apply to other named family or household members if good cause is demonstrated (Fam. Code, § 6320.)
18. ***Supervised visitation.*** Every court should encourage the establishment of a facility or provider of supervised visitation and safe exchange services in the county so that in an appropriate case, a party to a restraining order proceeding who has children has access to supervised visitation and safe exchanges. \$\$

19. ***Right to hearing.*** If a jurisdictionally adequate application for an ex parte temporary restraining order is denied, the court must set the matter for hearing in order to afford the applicant the right to be heard.<sup>1</sup>
20. ***Orders generally.*** The court shall consider the application for a restraining order and may issue all appropriate orders without requiring corroborating evidence.
21. ***Residence-exclusion orders.*** When a court issues a residence-exclusion order, the court should consider use of a mechanism for respondent to collect his or her belongings without violating the order. For example, a court could order a civil standby from law enforcement so that a party can set a time for picking up agreed upon items of personal property.
22. ***California Law Enforcement Telecommunications System (CLETS)/DVROS entry.*** Each court must comply with Family Code section 6380 so that all restraining orders, protective orders, and proofs of service of orders are transmitted to or entered into the statewide database as required within one business day. The DOJ should revise the statewide database to allow entry of all relevant orders, including those where the date of birth or age of the restrained person is unknown. The court should encourage persons seeking restraining orders to complete the restrained person identifiers, such as date of birth or age, to enhance enforcement of orders. \$\$
23. ***Withdrawal or dismissal of applications for restraining orders.*** If a litigant withdraws or requests dismissal of an application for a restraining order, the court should, whenever feasible, take steps to ensure that the withdrawal or request for dismissal is entirely voluntary and not a result of coercion or duress; should require proof of identity to make sure that the person requesting the withdrawal or dismissal is in fact the original applicant; and should encourage hearings to determine that the request is voluntary. The court should consider continuing the restraining order to allow the protected person time to discuss the request for dismissal with a support person.

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<sup>1</sup> Family Code section 242 requires the court to set a hearing within 20–25 days if a temporary order is issued. This provision does not limit the court’s discretion to set a hearing even if a temporary order is not issued. There are many reasons why the court may decline to issue a temporary order but, given the opportunity to hear evidence presented at a hearing, may issue an order after that hearing. Litigants are rarely represented in domestic violence matters and may not be able to adequately present their positions in their moving papers. A rule of court should be developed to allow such litigants to appear at a scheduled court hearing to provide testimony and supporting documents.

## Hearings and services

24. ***Courtroom security.*** When the parties to a domestic violence proceeding are present in the courtroom at the same time, the court should request the parties to stagger their departures, with the restraining order applicant departing first, to enhance safety, and the court should provide an escort for the protected person on a case-by-case basis. The court should also consider steps to enhance security in noncourtroom locations, such as hallways where parties wait to enter the courtroom. Pursuant to Government Code section 69920 et seq., the court should develop a security plan to enhance safety for all court officers and staff. \$\$
25. ***Staffing.*** The court should assign and manage appropriate staff in domestic violence cases to perform the following duties:
- Streamline procedures;
  - Promote safety in the courthouse;
  - Coordinate court processes and case information;
  - Assist court communication regarding existing protective orders and cases involving child custody or visitation;
  - Serve as a liaison with law enforcement, treatment services, Children’s Protective Services, victim’s assistance, advocates, probation departments, and other relevant agencies; and
  - Appropriately participate in the local family violence coordinating council or court/community practice and procedure committee.
- \$\$
26. ***Court interpreters.*** Each court should provide interpreters in domestic violence matters including Family Court Services mediation sessions and self-help settings. Courts may utilize the AOC grant program to fund interpreters in these proceedings.<sup>2</sup> \$\$
27. ***Training for court interpreters.*** Each court should ensure that court interpreters receive relevant training on issues of domestic violence. The AOC should provide support and curricula for developing the training. \$\$
28. ***Services in the courtroom.*** The court, in collaboration with community justice partners, should assess community resources, examine any gaps in resources, and inform appropriate officials accordingly with the goal of increasing available resources for litigants in domestic violence cases.
29. ***Self-represented litigants.*** Each judge hearing domestic violence restraining order proceedings should consider initiating appropriate questioning of self-represented

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<sup>2</sup> The task force acknowledges the need to address the lack of certified interpreters for some languages in some locations.

litigants to clarify facts and should explain the court's procedures as necessary in the specific case.

30. ***Scheduling hearings.*** The court should adhere to the statutory time periods for setting hearings on restraining orders, should endeavor to expedite these proceedings whenever possible to promote public safety, and should avoid unnecessary delays and continuances.

### **Court and case management**

31. ***Local procedures.*** To the extent that a court promulgates policies or procedures relating to restraining order proceedings, the procedures should be memorialized in writing and accessible to the public.
32. ***Calendar management.*** Each court should consider whether it should have a dedicated DVPA calendar with the goal of providing the following:
- Minimized number of court appearances
  - Trained staff
  - Triage/team approach
  - Comprehensive approach
  - Enhanced safety for court staff, parties, and children
  - Protocols to improve compliance with court orders, such as batterer intervention program completion
  - Specialized protocols as appropriate
  - Clear, appropriate, and enforceable orders
33. ***Calendar management.*** If a court determines that a dedicated DVPA calendar is not warranted in the jurisdiction, then the court should ensure that:
- There is a mechanism to identify all domestic violence cases to better provide services and staff; and
  - Domestic violence matters are given calendar priority to ensure safety and convenience of litigants.
34. ***Court coordination.*** Each court must develop a protocol as required by California Rules of Court, rule 5.450. The protocol should address communication between departments hearing domestic violence matters and should safeguard confidential information. The protocol should also provide a mechanism for researching related cases, orders, court dates, and information regarding children and providing the information to judges in all relevant departments. If needed, the court should reallocate or seek new funds to support this activity as a critical function of the court. The information should be integrated into the court's case management system. \$\$

35. ***Court communication.*** Each court should have a mechanism for internal court communication on practice and procedure in domestic violence cases suitable for the court size and caseload. One example is regular domestic violence judges' meetings.
36. ***Training.*** Each court should endorse and ensure training for all court personnel and judicial officers who may function in domestic violence cases as appropriate to their assignments. The court should also regularly provide information to bench/bar groups about court practice and procedure relating to domestic violence cases.
37. ***Statistics.*** The AOC shall provide the courts with guidelines for collecting domestic violence statistics. Each court should have a plan for keeping domestic violence statistics to better inform the justice system about domestic violence policy issues. At a minimum, statistical information should be available as to the number of DVPA filings, temporary restraining orders issued, number of children involved, proofs of service filed, number of reissuances, and number of restraining orders after hearing issued.
38. ***Facility security.*** To handle those cases in which domestic violence is identified or alleged, each court should develop reasonable safety procedures. These procedures should address, but are not limited to the following: reasonable efforts to keep residential addresses, work addresses, and contact information—including but not limited to telephone numbers and e-mail addresses—confidential in all appropriate cases and on all appropriate documents; ensuring that a trained security officer is present in the courtroom; providing safe ways to depart from the courthouse, such as providing safe waiting areas, elevators, stairwells, hallways, entrances and exits, and parking; and providing escorts for victims when needed, as feasible. Courts should consider the requirements of Government Code section 69920 when designing new facilities.
39. ***Domestic Violence Restraining Order System (DVROS).*** The court should ensure that all required domestic violence restraining orders as defined under Family Code sections 6203 and 6320 are entered into the Department of Justice Domestic Violence Restraining Order System (DVROS) and memorialized on mandatory Judicial Council forms. The statutory scheme contemplates that these orders should be entered into DVROS so that law enforcement agencies will have access to the orders, thus maximizing enforcement. Moreover, pursuant to federal law, any order that purports to prohibit specific threatening conduct, carries with it mandatory firearms restrictions that should not be obviated by a state court or by stipulation of the parties.
40. ***“Non-CLETS” restraining orders.*** Courts should decline to approve or make restraining orders that cannot be entered into DVROS or the California Law Enforcement Telecommunications System (CLETS), so-called “Non-CLETS” orders. The parties may request the court to approve agreements for restraining orders that



are not on Judicial Council forms and not entered into CLETS. As a product of settlement negotiations, such proposed orders may be offered by counsel for the parties. The proposed orders may be styled as “mutual” restraining orders in that they purport to bilaterally restrain both parties in exactly the same ways. Family Code section 6305 prohibits mutual restraining orders absent several prerequisites outlined in that section, and the parties may not have complied with these requirements.

Orders presented to the court that are not intended to be entered into CLETS may also create a false sense of security for the protected person and an expectation for enforcement by law enforcement. Since the orders are not in CLETS, law enforcement agencies do not necessarily enforce the orders. The only remedy courts can offer for a violation of such orders is contempt of court. This remedy is expensive, time-consuming, and technically difficult to prosecute, and it offers limited remedial response to the violation.

Since these orders may fail to recite firearms restrictions, even though these provisions may in fact be required by federal law, the orders may leave protected persons exposed to potentially lethal circumstances and restrained persons unaware of these firearms provisions.

The statutory scheme underlying the Domestic Violence Prevention Act does not appear to contemplate a relaxation of its mandatory provisions such as firearm relinquishment under Family Code section 6389, and thus, arguably, “Non-CLETS” orders are not permitted under the existing statutory framework.

Although these orders are an outcome of efforts to carefully balance attempts at resolution with the need to have some kind of restraining orders in place, the absence of the protections that CLETS orders offer places victims at too great a risk. This risk simply does not justify the advantages, if any, of “Non-CLETS” orders. When parties do seek to stipulate to allowable restrictions on contact, the court should advise the parties of the limitations wherever possible and make reasonable efforts to ensure that such agreements are not entered into as a result of the duress of any party, especially when one or more of the parties is not represented by counsel.

## Draft Guidelines and Recommended Practices

### Firearms Relinquishment

When a firearm is kept in a home where an abuser resides, nearly two-thirds of the victims report that it is used by the abuser to scare, threaten, or harm them. California and federal law bar persons subject to restraining orders, as well as defendants convicted of certain crimes, from possessing or purchasing firearms. Enforcement of these laws can reduce domestic violence homicides and diminish the power of abusers to terrorize and intimidate their partners.

The court's order to relinquish firearms, however, is not self-implementing. Persons protected by restraining orders may erroneously believe that when the court orders the restrained person to relinquish firearms, either law enforcement or the courts will take steps to ensure that the order is followed. But under California law, the onus is on the restrained person to follow through with the order to relinquish firearms to law enforcement or sell them to a licensed gun dealer. Anecdotal evidence suggests that some gun owners are extremely reluctant to comply.

The following proposals were developed from a review of national and state publications; staff discussions with law enforcement officials; a colloquium held in April 2006 by the Administrative Office of the Courts with judicial officers and court staff, justice system partners and domestic violence victim advocates; and review by the Judicial Council of California's Domestic Violence Practice and Procedure Task Force. The proposals reflect the limited reach of the courts, particularly in family law cases.

It is clear that implementation of the proposals, and firearm prohibition laws for that matter, will require the concerted actions of law enforcement officers, prosecutors, the defense bar, the courts, probation and parole officers, and victim advocates.

It is important to note, however, that California's courts are severely circumscribed by legal and practical considerations in their ability to ensure that restrained persons do not possess or have access to firearms or ammunition.

The very act of a court determining whether the restrained person or defendant has a firearm is fraught with difficulty. Inquiring of a restrained person or defendant whether he or she has a firearm invokes the U.S. Constitution's 5th Amendment protection against self-incrimination. Thus, courts must tread very carefully in this area.

Further, anecdotal evidence suggests that many of the firearms possessed by prohibited persons are unregistered. Thus, even if a court has the resources to search the firearms registry, the court would not discover that the person has a firearm because it would not

be listed. If a protected person or victim alleges that the restrained person or defendant has an unregistered firearm, an evidentiary hearing to determine the weapon's existence would likely yield little evidence on which the court could make a finding.

Finally, many restrained persons do not attend the Domestic Violence Prevention Act hearing at which the court orders firearms relinquished as part of the restraining order. Thus, setting a review hearing in these cases to determine compliance is, from a practical standpoint, a nearly futile undertaking.

Ultimately, public safety is best served when law enforcement and the entire justice system takes immediate action to remove firearms, whether registered or not, from the hands of a person who is statutorily barred from possessing them. The courts play a necessary and important role in achieving this goal but law enforcement, supported with appropriate laws and resources, is in the best position to ensure that the court's orders are obeyed.

Accordingly, the task force recommends that criminal justice entities consider seeking legislation that would require law enforcement to inquire about firearms possession and confiscate any firearms in plain view or disclosed at the scene of an incident at any stage.

It is with these factors in mind that the task force proposes the following practices, legislation, and court forms.

### **Communication and education**

1. ***Communication with justice system partners.*** Each court should have a system in place to regularly communicate with appropriate justice system partners, including law enforcement, prosecutors and defense attorneys, domestic violence victim advocates, and the bar, with the goal of developing firearm relinquishment protocols and procedures. Because the court is not an investigative or enforcement agency, the court must rely on its justice system partners to provide the court with necessary information, and to enforce compliance with firearm relinquishment orders.
2. ***Identification of law enforcement and gun dealers' policies.*** Courts should make reasonable efforts to learn about the existence, location, and relinquishment or sale policies of local gun dealers and law enforcement agencies, including fees for storage.
3. ***Education for law enforcement.*** Courts, in collaboration with local law enforcement, should make reasonable efforts to educate law enforcement officers and officials about mandatory firearm relinquishment statutes.

4. ***Court access to state and federal firearms databases.*** The Department of Justice should make every effort to encourage and improve court access to state and federal firearms databases.

#### **Legislation and/or Rules of Court**

5. ***Prosecutor to conduct firearms search in Automated Firearms System (AFS).*** Legislation should require prosecutors to perform a database search of the defendant's registered firearms and provide that information as currently set forth in Penal Code section 273.75.
6. ***Court to conduct firearms search in AFS.*** Family Code section 6306 should be amended to provide express authority for the courts to search the firearms database. Funding should be made available to the courts for implementation. \$\$

#### **Procedures**

##### **Emergency protective order**

7. ***Court inquiry.*** Prior to issuing an Emergency Protective Order (EPO), the on-call judge should ask the law enforcement officer if the restrained person has access to firearms.
8. ***Law enforcement inquiry.*** Penal Code section 13730 requires law enforcement to note, on every domestic violence-related call, if the officer found it necessary, for the protection of the peace officer or other persons present, to inquire of the victim, the alleged abuser, or both, whether a firearm or other deadly weapon was present at the location, and, if there is an inquiry, whether that inquiry disclosed the presence of a firearm or other deadly weapon.

##### **Criminal court protective orders**

9. ***Prosecutor to conduct database search for registered firearms.*** The prosecutor should conduct a firearms registration search through AFS and any other appropriate databases and provide the results to the court at arraignment.<sup>3</sup> However, the inability

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<sup>3</sup> California Penal Code section 273.75 currently requires the district attorney or prosecuting city attorney to perform a database search of the defendant's history, including, but not limited to, prior convictions for domestic violence, other forms of violence or weapons offenses, and any current protective or restraining order. The information shall be presented for consideration by the court (1) when setting bond or when releasing a defendant on his or her own recognizance (OR), and (2) upon consideration of any plea agreement. The databases include (1) Violent Crime Information Network, (2) Supervised Release File, (3) state summary criminal history information maintained by the DOJ, (4) Federal Bureau of Investigation's

to provide the court with timely information shall not delay the issuance of an order.  
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10. ***Oral advisement of firearm restrictions.*** The court should orally advise the defendant about firearms prohibitions and the requirement for timely relinquishment.
11. ***Distribute information sheet.*** The court should distribute an information sheet (developed with input from law enforcement) to inform the restrained person how to safely and legally relinquish his or her firearms. (This would require development of an optional Judicial Council court form).
12. ***Set review hearing.*** If there is evidence that defendant has possession or access to a firearm, the court should set a review hearing within 48 hours of the defendant being served with the protective order or, if the restrained person is in custody, 48 hours after release, to determine whether the relinquishment or sale receipt was filed. (Code Civ. Proc., § 527.9.) Courts may wish to set the hearing within 24 hours when logistically feasible. The court should order the restrained person to personally appear at the review hearing unless a sale/relinquishment receipt is filed within the statutory time frame.<sup>4</sup> \$\$
13. ***At hearing, make appropriate orders.*** If no receipt was filed and the defendant appears in court at the scheduled hearing, the court should hold a hearing on the firearm issue and make appropriate orders. If no receipt was filed and the defendant does not appear for the court hearing, the court should issue a no bail bench warrant and notify law enforcement, prosecutor, and defense for appropriate follow-up (would require development of an optional Judicial Council court form).

#### **Civil court restraining orders**

14. ***Court to conduct database search for registered firearms.*** The court (through sheriff, court, or pretrial services) should conduct a firearms search on the proposed restrained person through AFS or other appropriate database prior to the court issuing a protective order. However, failure or inability to conduct the firearms search shall not delay issuance of an order. \$\$

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nationwide database, and (5) locally maintained criminal history records. Legislation should add a search in the firearms database.

<sup>4</sup> This proposal would necessitate an evidentiary hearing to determine whether the defendant owns or possesses a firearm. The defendant could invoke the 5th Amendment right not to incriminate himself or herself. The task force recognizes that this may be a difficult endeavor, particularly in cases where the prosecutor's resources are thinly stretched.

15. ***Court to note reported firearms on restraining order.*** If firearms are reported (whether registered or not) to the court through a database search or by the protected party, the court should so indicate on the restraining order.
16. ***Oral advisement about firearm restrictions.*** The court shall inform parties of the terms of the restraining order, including notice that the restrained person is prohibited from owning, possessing, purchasing, or receiving or attempting to own, possess, purchase, or receive a firearm or ammunition, and including notice of the penalty for violation. (See Fam. Code, § 6304.). The court should also notify the restrained person about the right against self-incrimination found in the 5th Amendment to the United States Constitution.
17. ***Set review hearing.*** If the court concludes that the restrained person possesses or has access to a firearm, the court should set a review hearing to determine whether the restrained person complied with the relinquishment/sale order. If the restrained person states that he or she does not have the firearm, the court should offer the person the option of completing the Department of Justice “No Longer in Possession” form or appearing for the review hearing. The court should provide the protected person with the option to appear or consider other forms of appearance for the protected person. \$\$
18. ***At hearing, make appropriate orders and notify law enforcement and prosecutor’s office.*** If no receipt was filed and the restrained person appears in court at the scheduled hearing, the court should hold a hearing on the firearm issue and make appropriate orders. If the court finds that there is credible evidence that the restrained person has access to or possession of any firearms and has not complied with the relinquishment requirement, the court should consider notifying law enforcement and the prosecutor’s office. (Notification would require development of an optional Judicial Council form.) \$\$

## **Forms**

19. ***Firearm relinquishment information sheet.*** The Judicial Council of California has developed a statewide information sheet to inform restrained persons how to safely and legally relinquish or sell a firearm when so ordered. This form is currently used only for DVPA cases and is not locally modifiable. To encourage the widest possible use of this form, the AOC should revise the form so that it can be used with all types of protective orders that call for firearm relinquishment. Further, the form should contain space for courts to insert local law enforcement agency safety and location information. (See Judicial Council form DV-810.)
20. ***“Failure to relinquish or sell firearms” notification form.*** When the court is presented with evidence that a restrained person has possession or control of a firearm (registered or not) either through admission, the protected person’s declaration, or a

database search but that person does not file a relinquishment receipt, the court should consider notifying law enforcement and the prosecutor's office so that they can take appropriate action. The AOC should develop a form and procedure, in consultation with the DOJ and other agencies as appropriate, to ensure the timely notification of justice system partners about the restrained person's violation of the restraining order.

21. ***Revise application and restraining and protective order forms to add check box for reported firearms.*** To enhance a judicial officer's knowledge of the potential for violence and law enforcement's ability to seize firearms, all appropriate restraining and protective orders should indicate whether firearms were reported (whether reported through a database search or a protected person's declaration) by adding a check box for "Firearms reported" or similar text.
22. ***Revise EPO form to indicate reported existence of firearms.*** Revise EPO form to add two discretionary check boxes, one for "Firearms reported" and one for "Firearm owner." These check boxes would allow law enforcement to indicate whether firearms were reported by any person at the scene (pursuant to Pen. Code, § 13730) or discovered pursuant to a database search.

## Draft Guidelines and Recommended Practices

### Access to and entry of orders into the Domestic Violence Restraining Order Systems (DVROS)/ California Law Enforcement Telecommunications System (CLETS)

#### Introduction

Courts are required to transmit criminal and DVPA orders to a local law enforcement agency or to directly enter the orders into DVROS within one business day. Currently only six trial courts have direct entry access to DVROS via CLETS.

The DOJ controls access to CLETS. A court must apply to DOJ for access. From early meetings of the Domestic Violence Practice and Procedure Task Force (task force), members expressed concern with the application process. Many members commented on problems in bringing law enforcement onboard and the extremely arduous application process, with one court commenting that it took more than six years to gain access.

On June 21, 2006, the task force hosted a CLETS Access Forum to provide an opportunity for the six courts to demonstrate their individual operations and to explain the obstacles, challenges, and achievements during the process of obtaining CLETS approval. To maintain a representative balance, additional small, medium, and large courts were invited. Each participating court was encouraged to send a team consisting of the executive officer and representatives from information systems and operations. In addition to learning from the six courts, information about the role of the AOC in providing technical assistance to the courts interested in improving CLETS access as well as the long-term objective of automating the process of entering orders into CLETS via the case management system was distributed to the program participants.

The presentations, small group discussions, and large group plenary sessions served as a foundation for the proposals set forth below and are presented as immediate, interim, and long term goals.

1. **Access to CLETS.** Each court must have access to the Domestic Violence Restraining Order System (DVROS) database and to other databases within CLETS, such as AFS (the firearms registry), as deemed necessary by the court or as required by statute.
2. **Needs assessment.** Each court should evaluate current procedures, protocols, and timelines for processing restraining orders, from the granting of the order to its entry into DVROS, whether the court enters the orders directly or transmits the orders to law enforcement for entry into DVROS. The court should ensure that all orders are being entered into DVROS promptly and are consistent with all statutory



requirements. To the extent that delays or inconsistencies are discovered, the court should take all necessary steps to eliminate these by enhancing procedures and protocols. Courts should periodically review the assessments to ensure that procedures and protocols remain current.

3. ***Communication: court and justice partners.*** Courts should hold regular meetings with local law enforcement and other related justice partners to monitor procedures and to review operations to ensure consistency and accountability in handling restraining orders. The courts and the entering law enforcement agency, if any, should develop a plan to monitor and validate that orders, proofs of service, and modifications are entered into DVROS promptly and are consistent with all statutory requirements.
4. ***Communication: AOC and DOJ.*** The AOC and the DOJ should establish a user group that conducts regular meetings to review policy and practices regarding entry of restraining orders. This review team could also assist in establishing standards for training, audit practices, and implementation.
5. ***Implementation standards.*** The AOC and local courts should recommend that the DOJ streamline the CLETS application process and establish implementation standards statewide to eliminate barriers to court access to DVROS.
6. ***Audit standards.*** The AOC and local courts should recommend that the DOJ standardize CLETS audit procedures statewide.
7. ***Training standards.*** The AOC and local courts should recommend that the DOJ establish a training program unique and specific to court staff handling restraining orders. Local courts should ensure that staff receive adequate training and have access to CLETS-related training and informational Web sites.
8. ***Data collection.*** Courts should maintain statistical information on domestic violence cases to improve the information available to the justice system and to support the development of domestic violence policy. Courts should be able to analyze the data and address inconsistencies and anomalies. The AOC should encourage participation in its Judicial Branch Statistical Information System (JBSIS) and enhance the system as needed to facilitate courts' collection of domestic violence case-related statistical information. At a minimum, statistical information should be available as to the number of DVPA filings, temporary restraining orders issued, number of children involved, proofs of service filed, number of reissuance(s), and number of restraining orders after hearing issued.

### **Interim proposals**

9. ***Restraining order registry.*** Each court should have a domestic violence registry available online that contains an image of every order relevant to the proceeding that is accessible to judicial officers, staff, and law enforcement within the jurisdiction with duties to perform relating to domestic violence cases. As an interim measure, steps should be taken to create a regional protective order registry using courts with existing models as a pilot.
10. ***Computer-generated orders.*** The AOC should continue to explore computer-generated orders that will be able to interface with the California Case Management System (CCMS) and evaluate existing forms from the perspective of data entry. Local courts are encouraged to explore the feasibility of using the Judicial Council's Family and Children's Court Technology System (FACCTS) program to produce computer-generated orders after hearing.
11. ***Service of orders.*** Using a collaborative process with justice system partners, each court should evaluate ways to improve procedures for prompt and effective service of orders and take steps to facilitate prompt service and prompt entry of service into DVROS.

### **Long-term proposals**

12. ***Integration with CCMS.*** The AOC and local courts should work together to establish a seamless process from the point that the order is granted to its entry in DVROS, using an automated process that is integrated into CCMS. AOC staff should work together to ensure that relevant domestic violence information is included in the CCMS data elements.

## Draft Guidelines and Recommended Practices

### Domestic Violence Criminal Procedure

The June 2005 report to the California Attorney General from the Task Force on Local Criminal Justice Response to Domestic Violence, entitled *Keeping the Promise: Victim Safety and Batterer Accountability*, outlines a series of problematic practices and recommendations relating to the adjudication of criminal domestic violence cases. Among these are the following highlights that point out systemic problems but that also pertain primarily to court practice and procedure:

- Arraignment, plea and sentencing without prosecutors in attendance;
- Sentences that appear to be out of compliance with Penal Code section 1203.097 relating to mandatory terms and conditions of probation;
- Widespread apparent failure to complete batterer intervention programs; and
- Asserted inadequacy of monitoring and follow-up regarding compliance with terms and conditions of probation.

The Judicial Council task force sought to analyze these assertions and looked at the entirety of criminal procedure in domestic violence cases, from filing through postconviction proceedings. The following proposals are the result of the task force inquiry. They seek to address issues raised in the 2005 report and to improve practices in these cases generally. The proposals include both mandatory provisions required by statute or rule as well as advisory practices. The proposals, taken as a whole, form a useful chronology of required and aspirational practices for the criminal law judicial officer in domestic violence cases.

At the outset, we note that the statutory framework underlying Penal Code section 1203.097 contemplates adequate funding and full functioning of county probation departments as necessary to ensure the defendant's opportunity to successfully complete probation. Defendant's successful completion directly and positively affects public safety and the safety of domestic violence victims. The presence of fully funded probation services in each jurisdiction is a necessary element of an effective criminal justice response to domestic violence. Since the Judicial Council has no direct authority for the funding of probation services, the task force specifically invites further comment from interested persons and justice system entities on this issue.

## Draft Guidelines and Recommended Practices

### Domestic Violence Criminal Procedure

#### **Administration procedures**

1. *Administration of criminal domestic violence cases.* Each court should ensure that the following administrative procedures are followed with respect to domestic violence cases:
  - a. The judicial review of the bail schedule should include consideration of issues relating to domestic violence;
  - b. The court should collaborate with the chief probation officer to ensure that the functions of probation delineated in Penal Code section 1203.097 are adequately performed, including duties to monitor the defendant's compliance with the terms and conditions of probation and to certify batterer intervention programs; and
  - c. In conjunction with the duties enumerated in California Rules of Court, rule 227.8, the court should ensure that issues relating to practice and procedure in domestic violence cases are identified and discussed in regular meetings with criminal justice partners.

## Draft Guidelines and Recommended Practices

### Domestic Violence Criminal Procedure

#### Pretrial

##### Bail release considerations

2. ***Bail schedule.*** Every county must adopt and review a bail schedule. (Required by Pen. Code, § 1269c.)
3. ***Standardized procedure.*** To enhance public safety in domestic violence cases, local courts should work with probation, pretrial services, and law enforcement agencies to develop a standardized procedure for setting bail so that the court receives the following information: (a) requests for increased bail; (b) indication of relationship between defendant and victim; (c) whether a firearm was involved; (d) weapons seized; (e) source of information regarding crime and firearms present; and (f) whether children were involved or were witnesses.
4. ***Law enforcement policy.*** For all domestic violence arrests, law enforcement should adopt a “no own recognizance (OR)” and “no cite and release” policy unless a court hearing is conducted. [Pen. Code, § 1296(c) (requests for increased bail).]

##### Hearing procedures

5. ***Hearing purposes.***
  - a. Under Penal Code section 1270.1(a), a hearing, typically at arraignment, must be held for any person charged with:
    - Penal Code 136.1 (intimidating a witness)
    - Penal Code section 243(e)(1) (battery against a spouse, cohabitant, person who is the parent of the defendant’s child, noncohabitating former spouse, fiancée, or a person with whom the defendant currently has or has previously had a dating relationship)
    - Penal Code section 262 (spousal rape)
    - Penal Code section 273.5 (corporal injury)
    - Penal Code section 273.6 (knowing violation of a protective order under specified circumstances)
    - Penal Code section 422 (felony violation of a threat to an immediate family member)
    - Penal Code section 646.9 (stalking)
  - b. The prosecution must be afforded two court days written notice of the hearing and an opportunity to be heard. (Pen. Code, § 1270.1(b).)

- c. If bail is otherwise set than is provided in the bail schedule, the record must reflect the reasons for the court's decision and address the issue of threats to the victim and victim safety. (Required by Pen. Code, § 1270.1.)
- 6. **Information needed.** A defendant's bail may be increased from the bail schedule amount depending on certain factors. The court should attempt to obtain and review all relevant information. This includes:
  - a. All other pending cases, including probation violations as a result of this case;
  - b. Rap sheet and probation or parole status;
  - c. Existing and previously issued protective or restraining orders where the defendant is the restrained party;
  - d. Any prior failures to appear;
  - e. Statements by victims;
  - f. Whether children were present or if there are visitation issues;
  - g. All information about the status of family, juvenile, probate, or other court orders that may exist;
  - h. Firearms registry information from Automated Firearms System (AFS);
  - i. Prior unreported incidents of domestic violence;
  - j. Use of alcohol or drugs or prior history of mental illness.
- 7. **Local variations.** The timing and procedures for setting bail and the bail amount may vary from jurisdiction to jurisdiction but the court should nevertheless obtain all relevant information.
- 8. **Appearance within 48 hours.** If bail is posted, the defendant should be directed to appear within 48 hours for arraignment.

### **Arraignment**

- 9. **Defendant's appearance.** Defendant's presence at arraignment is mandatory. (Required by Pen. Code, § 977.)
- 10. **Procedures.** To assist the court in determining whether to issue a criminal protective order (CPO) and in setting bail, recommended practices would include:
  - a. Defense counsel and prosecution should be present at arraignment; \$\$
  - b. All probation violations should be calendared with the arraignment to ensure that the court revokes probation as appropriate;
  - c. Prosecution, OR services, or probation, as appropriate, should contact the victim prior to arraignment and report to court;
  - d. Determine gun ownership from DOJ records;
  - e. Consider issuance of a criminal protective order;
  - f. Order firearms relinquishment.(Pen. Code, § 136.2(7)(b).)

## Setting bail

11. ***Ensure appearance and protect victim.*** If the defendant is arrested for violating a domestic violence restraining order, the court may set bail at any amount that it deems sufficient to ensure the defendant's appearance or the protection of the victim or the victim's family members. (Required by Pen. Code, § 1269c.)
12. ***Notice to prosecutor.*** When a defendant charged with Penal Code section 646.9 is released on bail, the sheriff must notify the domestic violence unit of the prosecutor's office in the county where the victim resides. (Required by Pen. Code § 646.9(a).)
13. ***Notice to victim.*** If there is a request to lower bail, the prosecutor must make all reasonable efforts to notify the victim and the victim is entitled to attend the hearing. (Required by Pen. Code, § 646.93(b).)
14. ***Additional conditions.*** The court may impose additional conditions unless good cause is shown, and any violation can result in a no-bail warrant. Examples of additional conditions are:
  - Defendant cannot initiate contact with the victim.
  - Defendant cannot initiate contact with the children.
  - Defendant must not knowingly go within a specified distance of the victim or his or her workplace or home.
  - Defendant must not knowingly go within a specified distance of the children's school.
  - Defendant must not possess a firearm.
  - Defendant must obey all laws.
  - Defendant may be obligated to wear an electronic monitoring device.
  - Defendant must notify court of his or her address and telephone number at home and work. (Pen. Code, § 646.93(c).)
15. ***Protection of the public factors.*** The court must consider protection of the public factors in granting or denying bail. Factors are:
  - Seriousness of offense charged;
  - Defendant's character (previous criminal record);
  - Probability of defendant appearing at hearing or trial;
  - Alleged threats to the victim or to a witness to the crime charged;
  - Alleged use of a firearm or other deadly weapon in the commission of the crime charged;
  - Alleged use or possession of a controlled substance by the defendant. (Pen. Code, § 1269b.)
16. ***Relevant information.*** In connection with setting any bail, the court should attempt to obtain and review all relevant information. This includes:
  - a. All other pending cases, including probation violations as a result of this case;
  - b. Rap sheet and probation or parole status;

- c. Existing and previously issued protective or restraining orders where the defendant is the restrained party;
- d. Any prior failures to appear;
- e. Statements by victims;
- f. Whether children were present or if there are visitation issues;
- g. All information about the status of family, juvenile, probate, or other court orders that may exist;
- h. Firearms registry information from Automated Firearms System (AFS);
- i. Prior unreported incidents of domestic violence;
- j. Use of alcohol or drugs or prior history of mental illness.

See also “Information needed,” item 6, on page 30.

### **Release on own recognizance (OR)**

17. ***OR prohibited without a hearing.*** If the defendant is charged with a violent felony or specified domestic violence offense, no OR can be granted without open court hearing. (Pen. Code, § 1270.1.) If the court grants an OR release, it may order and impose specific conditions on defendant’s release, including, for example, conditions such as prohibiting the use of alcohol or ordering defendant to report to the court all law enforcement contacts.
18. ***Investigative report.*** In all cases involving violent felonies, if an investigative staff exists, a report is required that verifies in writing the existence of outstanding warrants, any prior failures to appear, the criminal record of the defendant, and the defendant’s residences during the last year. (Pen. Code, § 1318.1.)
19. ***Resources for report.*** In all cases involving violent felonies, sufficient resources should be afforded so that a report is submitted that verifies in writing the existence of outstanding warrants, any prior failures to appear, the criminal record of the defendant, and the defendant’s residences during the last year.
20. ***Consideration even if no notice.*** If a motion for OR release is made at the OR hearing under Penal Code section 825, the court must exercise its discretion to grant or deny the motion even in the absence of the two-court-day written notice. (*Dant v. Superior Court* (1998), 61 Cal. App.4th 380.)
21. ***Reasons for deviation from schedule.*** If bail is set in an amount other than that provided for in the bail schedule, the record must reflect the reasons for the court’s decision and address the issue of threats to the victim and victim safety. (See 5c, “Hearing purposes,” on page 29.)

### **Issuing criminal protective orders**

22. ***Grounds for order.*** A stay-away order should be issued when it is shown that there is good cause to believe that harm to, intimidation, or dissuasion of a victim or witness has occurred or is likely to occur. (Pen. Code, § 136.2.)



23. ***Reasonable restrictions.*** The court must consider issuing protective orders on its own motion. The court may impose reasonable restrictions, including restricting defendant's access to the family residence, and barring communication by defendant or defendant's agent with the victim, except through an attorney. (Pen. Code, § 136.2(d).)
24. ***No-contact orders.*** No-contact orders may be issued in domestic violence cases as a condition of OR and as an independent order. (Pen. Code, §§ 1275, 1318 (a)(2), or 136.2.)
25. ***Additional considerations.*** In addition to the considerations listed above in "Setting Bail," the court should:
- a. Evaluate whether there is good cause for issuance of a stay-away order under Penal Code section 136.2.
  - b. Ascertain whether defendant has any firearms.
  - c. Determine if the criminal protective order conflicts with the family court order and advise the defendant that the criminal order controls.
  - d. Serve the criminal protective order on the defendant and victim, if present, in open court.
  - e. Advise defendant that violation of the criminal protective order may result in additional charges, and in immigration consequences.

## Draft Guidelines and Recommended Practices

### Domestic Violence Criminal Procedure

#### Trial

##### Trial setting

26. *Case management.* After arraignment, the court should set a hearing or conference for the purpose of managing the case. At the hearing, the court should consider:
- Settlement discussions;
  - Issuance of a stay away order under Penal Code section 136.2;
  - Changes in bail if appropriate;
  - Any new information disclosed by counsel;
  - Setting the case for preliminary hearing or misdemeanor jury trial.

##### Continuances

27. *Good cause.* Good cause for continuance in domestic violence cases includes unavailability of the prosecutor due to other trial, preliminary hearing, or motion to suppress in progress. The continuance must be limited to a maximum of 10 additional days. (Pen. Code, §1050(g)(2).)
28. *Facts supporting good cause stated.* The court must state on the record facts constituting good cause for a continuance. (Pen. Code, § 1050(f).)
29. *Continuances discouraged.* Domestic violence cases should have high priority. Continuances are strongly discouraged and motions for continuances must comply with the requirements of Penal Code section 1050.

##### Dismissal/Refiling

30. *Refiling within six months.* If the court dismisses a misdemeanor domestic violence case because the victim failed to appear in response to a subpoena, the case may be refiled within six months. This section may be invoked only once in each action. (Pen. Code, § 1387(b).)

##### Evidentiary issues

31. *Confidential communications.* Communications between the victim and the domestic violence counselor are confidential. The factors to be considered by the court to determine whether a person qualifies as a domestic violence counselor are if the person:

- a. Is employed by an organization under Welfare and Institutions Code section 18294 and
- b. Has any of the following:
  - Master's degree in counseling or a related field;
  - One year experience in counseling (minimum of six months must be in domestic violence counseling);
  - Is a psychotherapist under Evidence Code section 1010; or
  - Is an intern or trainee or other person with a minimum of 40 hours of domestic violence training under someone with a master's degree in counseling or a related field or someone who has one year of counseling experience of which minimum of six months is in domestic violence counseling. (Evid. Code, § 1037–1037.7.)

32. ***Exclusion of privileged information.*** The court may exclude privileged information from a domestic violence counselor on its own motion if neither the witness nor the party can claim the privilege. (Evid. Code, §916.) The court should ask the prosecutor if there is any undisclosed statement for which the privilege is asserted. If the victim has not authorized the prosecutor to assert the privilege nor is present to make the assertion, the prosecutor can make the assertion under Evidence Code section 916. (Evid. Code, §1040(b)(2).)

33. ***Burden of proof.*** The claimant of a privilege has the burden of proving (a) the existence of the relationship; (b) standing to claim the privilege; and (c) that the offered evidence is a confidential communication within that relationship. (Evid. Code, § 1037.)

34. ***Disclosure prohibited.*** Disclosure of the address or telephone number of victims and witnesses is prohibited. (Pen. Code, § 1054.2.)

35. ***Special needs.*** The court should ensure that the special needs of certain victims or witnesses are taken into consideration. Examples might include the needs of the elderly, children, or dependent adults.

## **Discovery**

36. ***Medical records.*** In addition to the requirement that the prosecutor turn over all possibly relevant evidence to the defense, any medical record of the victim or defendant related to the domestic violence is discoverable in a domestic violence criminal case. (Pen. Code, §§ 1054–1054.8 and Evid. Code, § 998.)

37. ***Protocols for access to information.*** Disclosure by defense counsel or law enforcement of the victim or witness address and contact information to defendant is prohibited. Under Penal Code section 964, courts are to develop protocols with local law enforcement regarding public access to victim and witness personal identifying

information contained in police reports filed with the courts. (Pen. Code, §§ 841.5(a), 964, and 1054.2.)

### **Jury selection in domestic violence cases**

38. **Larger juror panel.** The court should consider calling a larger juror panel because many potential jurors in domestic violence cases may have been victims or witnesses, or their family or close friends may have been victims or witnesses.
39. **Juror privacy.** The court should respect the dignity and confidentiality of jurors in voir dire:
- a. Questioning jurors outside the presence of other jurors should be offered.
  - b. Jurors should be informed that questionnaires, transcripts, and juror records are not confidential unless sealed by court order.
  - c. For juror safety, the court should be sensitive to the release of juror addresses.
  - d. Jurors should be referred to using juror numbers rather than last names.

### **Support persons**

40. **Right to a support person.** The alleged victim is entitled to have a support person or family member present at the hearing. (Pen. Code, §§ 868, 1102.6.)
41. **Victim's right to be present.** The victim has a limited right to be present at all stages of the criminal proceedings except when subpoenaed as a witness. (Pen. Code, § 1102.6(b)(1).)
42. **Victim protections.** The court should consider applying the statutory protections available to sexual assault victims in domestic violence cases and state its reasons for doing so on the record.

### **Victim testimony**

43. **Hearsay evidence.** Each court should be cognizant of the admissibility issues regarding hearsay evidence under the United States Supreme Court opinion in *Crawford v. Washington* (2004) 541 U.S. 36. Under *Crawford*, statements are generally inadmissible if the declarant is not present and, if the statement is “testimonial,” has not been previously cross-examined. The California Supreme Court has accepted review for numerous cases addressing various hearsay issues under *Crawford*.
44. **Testimony of victim.** If a victim is reluctant to testify, the court should attempt to discover the reasons for the victim's reluctance and whether the victim has been coerced or intimidated. To assist in this process, the court should consider the strategies and questions outlined in the *California Judges Benchbook: Domestic Violence Cases in Criminal Court* (Third Edition), §§ 4.24 and 4.25, pages 84–86.

### **Compelling participation or testimony**

45. **Contempt.** If the court holds a domestic violence victim in contempt for refusal to testify, the order must be stayed pending filing of a petition for extraordinary relief to determine the lawfulness of the court's order. Such orders are given a three-day stay of execution. (Code Civ. Proc., § 128(e).)
46. **Counseling and community service.** The first time a domestic violence victim refuses to testify in a case, the victim cannot be incarcerated for contempt of court; rather, if the court finds the victim in contempt, the court can order 72 hours of domestic violence counseling or "appropriate community service." (Code Civ. Proc., § 1219(c).)
47. **Options.** If a victim or witness is reluctant to testify various options are available to the court. Please see the discussion in the *California Judges Benchbook: Domestic Violence Cases in Criminal Court* (Third Edition), pages 87–89. Also see Penal Code section 1324.1, which limits contempt for failure to testify in misdemeanor cases.

## Draft Guidelines and Recommended Practices

### Domestic Violence Criminal Procedure

#### Dispositions

##### Sentencing

48. **Fines.** Courts must consider whether the defendant should pay a fine or as a condition of probation, should make restitution to the victim or to the Restitution Fund, and the amount thereof. (Pen. Code, § 1203(b)(2)(C)(ii).)
49. **Restitution.** Restitution to the victim is primary even if the defendant is ordered to repay other costs such as public defender and probation. (Pen. Code, § 1204(f)(2).)
50. **Probation.** If the defendant is convicted and placed on probation for any crime committed against the following victims:
- Spouse or former spouse;
  - Cohabitant or former cohabitant;
  - Person the defendant is dating or has dated;
  - Mother or father of the defendant's child; or
  - A person related by blood or marriage within the second degree
- (Pen. Code, § 1203.097.)

Then the court must impose:

- Minimum probationary term of three years (formal or informal);
  - Completion of 52-week batterer's counseling program;
  - Minimum \$400 domestic violence program fine (Pen. Code, § 1203.097(a)(5)); one-third of this fine may be waived if, as a condition of probation, the defendant is ordered to make a payment up to \$5,000 to a battered women's shelter to reimburse the victim for reasonable expenses; or
  - Criminal Protective Order under Penal Code section 1203.097(a)(2) – see item 51, below. (Pen. Code, § 1203.097(a)(11)(A).)
51. **Batterer's intervention programs.** A 52-week intervention program has the following requirements:
- The program must be approved by the probation department;
  - The defendant must enroll within 30 days of sentencing or release date;
  - The program must provide periodic progress reports at least every 3 months;
  - The defendant must complete the program within 18 months of enrollment;
  - The defendant can have only three unexcused absences;

- The court cannot waive program fees, but the court must consider the defendant's ability to pay and ensure that a program with a sliding fee scale is available. (Pen. Code, § 1203.097.)

52. ***Protective orders.*** A protective order under Penal Code section 1203.097 is mandatory to protect “the victim from further acts of violence, threats, stalking, sexual abuse, and harassment.” (Pen. Code, § 1203.097(a)(2).) Additionally, a court with jurisdiction over a criminal case may issue a protective order under Penal Code section 136.2 “if there is good cause to believe that harm to, or intimidation or dissuasion of, a victim or witness” has or is likely to occur. (Pen. Code, § 136.2(a).)

53. ***Protective order provisions and procedures.*** The protective order:

- Must prohibit violence, intimidation, or threats;
- May prohibit contact with the victim;
- May allow contact for visitation allowed by custody order;
- Must be issued on mandatory Judicial Council form (CR-160) for any order issuing, modifying, extending, or terminating a criminal protective order, including probation conditions;
- Must be kept by the court in the original in the court file. (Pen. Code §§ 136.2 and 1203.097.)

54. ***Local rule for communication.*** The court must promulgate a local rule delineating the procedure for communication among courts issuing or modifying criminal protective orders and courts issuing orders involving child custody and visitation. (Pen. Code, § 136.2(f); Cal. Rules of Court, rule 5.450) Additionally, courts should delineate a similar procedure for communication among courts issuing or modifying criminal protective orders and courts issuing civil or other restraining orders involving the same parties.

55. ***Order during pendency of the proceeding.*** The court must consider issuing a criminal protective order during the pendency of the proceeding and may do so on its own motion in an appropriate case. (Pen. Code, § 136.2(h)(1).)

56. ***Firearms restrictions.*** The court must make all applicable firearm restriction orders under state and federal law. (Pen. Code, § 136.2(a)(7)(A).)

57. ***Entry into CLETS.*** Criminal protective orders must be entered in CLETS by the court or its designee within one business day. (Pen. Code, § 136.2(a)(7)(A); Fam. Code, § 6380(a).)

58. ***Copies.*** All interested parties must receive a copy of the criminal protective order. (Pen. Code, § 136.2(h)(1).)

59. **Expiration.** Penal Code section 136.2 criminal protective order expires before or on the date that criminal jurisdiction over the defendant terminates. (*People v. Stone* (2004), 123 Cal.App.4th 153.)
60. **Notice.** Penal Code section 1203.097(a)(3) provides that if probation has been granted, the victim is to be notified of the disposition of the case. Prosecutors should provide this notice because they have (or have access to) the victim's address and the court often does not. Moreover, if the court were to give this notice, the notice, including the victim's address, could become a publicly accessible court record.
61. **Restitution fine.** On probationary sentences, the court should consider increasing the amount of the restitution fine above the statutory minimum and, if all the conditions of probation are satisfied, the court can then waive the elevated fine. On the other hand, if probation is revoked, the court has the flexibility to imposing a restitution fine other than the statutory minimum.
62. **Review of other orders.** Before sentencing, the court should review all outstanding orders regarding the defendant that may be pending in a family law matter and in all other cases.



## Draft Guidelines and Recommended Practices

### Domestic Violence Criminal Procedure

#### Postconviction

63. ***Progress reports.*** The court must receive “periodic progress reports . . . every three months or less” regarding the defendant’s participation in the Batterer Intervention Program. (Pen. Code, § 1203.097(a)(6) and (c)(1)(O)(ii).) Judicial Council form CR-168, *Batterer Intervention Progress Report*, may be used by the probation department or the program provider to periodically inform the court of defendant’s progress in the program.
64. ***Final evaluation.*** The court must receive a “[f]inal evaluation that includes the program’s evaluation of the defendant’s progress” in the Batterer Intervention Program. (Pen. Code, § 1203.097(c)(1)(O)(iii).)
65. ***Defendant’s appearance during probation.*** The court should consider requiring the defendant to appear for periodic progress reports during the probationary period. This appearance may help increase compliance with the probationary conditions, partly because of the court’s involvement. Courts may consider waiving the appearance requirement if the defendant is in full compliance.
66. ***Graduated sanctions.*** The court should use graduated sanctions for probation violations, including failures to comply with Batterer Intervention Program counseling conditions. Graduated sanctions take into account the totality of the circumstances of the defendant’s performance and progress while on probation, as well as the impact on the victim. By using graduated sanctions, the court maintains discretion and flexibility in addressing the unique circumstances in each case.
67. ***Role of probation.*** Defendant’s successful completion of the terms and conditions of probation, and therefore the rehabilitation of the defendant, public safety, and the safety of the victim, are directly tied to the involvement of the probation department and probation officer. As a result, the court should advocate for adequate funding for probation services needed to appropriately review and certify programs that meet the statutory requirements, and those necessary to monitor, supervise, and counsel the defendant.

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## **Domestic Violence Practice and Procedure Task Force**

**Hon. Laurence Donald Kay (Ret.), Chair**  
Presiding Justice of the Court of Appeal,  
First Appellate District, Division Four

**Hon. Mary Ann Grilli**  
Judge of the Superior Court of California,  
County of Santa Clara

**Hon. Deborah B. Andrews**  
Judge of the Superior Court of California,  
County of Los Angeles

**Ms. Tressa S. Kentner**  
Executive Officer of the  
Superior Court of California,  
County of San Bernardino

**Hon. Jerilyn L. Borack**  
Judge of the Superior Court of California,  
County of Sacramento

**Hon. Quentin L. Kopp (Ret.)**  
Judge of the Superior Court of California,  
County of San Mateo

**Hon. Jeffrey S. Bostwick**  
Judge of the Superior Court of California,  
County of San Diego

**Hon. Jean Pfeiffer Leonard**  
Judge of the Superior Court of California,  
County of Riverside

**Hon. Tani Gorre Cantil-Sakauye**  
Associate Justice of the Court of Appeal,  
Third Appellate District

**Hon. William A. MacLaughlin**  
Presiding Judge of the  
Superior Court of California,  
County of Los Angeles

**Hon. Sharon A. Chatman**  
Judge of the Superior Court of California,  
County of Santa Clara

**Hon. George A. Miram**  
Presiding Judge of the  
Superior Court of California,  
County of San Mateo

**Hon. Katherine A. Feinstein**  
Judge of the Superior Court of California,  
County of San Francisco

**Mr. James B. Perry**  
Executive Officer of the  
Superior Court of California,  
County of Yolo

**Hon. Susan P. Finlay (Ret.)**  
Judge of the Superior Court of California,  
County of San Diego

**Hon. Rebecca S. Riley**  
Judge of the Superior Court of California,  
County of Ventura

## **Domestic Violence Practice and Procedure Task Force**

### **Mr. Alan Slater**

Chief Executive Officer of the  
Superior Court of California,  
County of Orange

### **Hon. Dean Stout**

Presiding Judge of the  
Superior Court of California,  
County of Inyo

### **JUDICIAL COUNCIL LIAISON**

### **Hon. Scott L. Kays**

Judge of the Superior Court of California,  
County of Solano

### **GOVERNING COMMITTEE OF THE CJER LIAISON**

### **Ms. Inga E. McElyea**

Executive Officer of the  
Superior Court of California,  
County of Riverside

## **Domestic Violence Practice and Procedure Task Force**

### **AOC STAFF TO THE TASK FORCE**

**Ms. Bobbie Welling**

Supervising Attorney  
Center for Families, Children & the Courts  
Administrative Office of the Courts  
455 Golden Gate Avenue  
San Francisco, CA 94102  
415-865-7822  
Fax 415-865-7217  
bobbie.welling@jud.ca.gov

**Ms. Tamara Abrams**

Senior Attorney  
Center for Families, Children & the Courts  
Administrative Office of the Courts

**Ms. Penny Davis**

Senior Court Services Analyst  
Center for Families, Children & the Courts  
Administrative Office of the Courts

**Ms. Jenny Lee**

Administrative Coordinator  
Center for Families, Children & the Courts  
Administrative Office of the Courts

**Ms. Julia Weber**

Supervising Attorney  
Center for Families, Children & the Courts  
Administrative Office of the Courts

**Mr. Joshua Weinstein**

Senior Attorney  
Office of the General Counsel  
Administrative Office of the Courts